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3 **BEFORE THE INSURANCE COMMISSIONER**
4 **OF THE STATE OF WASHINGTON**
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6 In the Matter of the Application regarding
7 the Conversion and Acquisition of
8 Control of Premera Blue Cross and its
9 Affiliates.

Docket No. G02-45

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11 **THIRD ORDER: RULING ON**
12 **PREMERA'S OBJECTIONS TO**
13 **THE CASE MANAGEMENT**
14 **ORDER**

15 On November 26, 2002, a hearing was held at the John A. Cherburg Building,
16 Senate Hearing Room 2, Olympia, Washington. The hearing was reported and opened to the
17 public. Present on behalf of Premera Blue Cross and its affiliates ("Premera") were the
18 following individuals: Yori Milo, Chief Legal Officer; John Domeika, General Counsel; and
19 Thomas Kelly and Kirk Dublin, Preston Gates & Ellis, LLP. Present from the Office of the
20 Insurance Commissioner ("OIC") Staff were the following individuals: Jim Odiorne, Deputy
21 Insurance Commissioner for Company Supervision; John Hamje, Staff Attorney; and
22 Jim Tompkins, Staff Attorney. Eleanor Hamburger and Jeff Coopersmith were present on
23 behalf of petitioning intervenors. I was assisted by Carol Sureau, Deputy Insurance
24 Commissioner for Legal Affairs, and Christina Beusch, Assistant Attorney General. The
25 purpose of the hearing was to hear argument on Premera's objection to the FIRST ORDER:
26 CASE MANAGEMENT ORDER ("Case Management Order" or "CMO") and to receive an
update from the OIC Staff and Premera on the status of the Staff's request for information and
Premera's responses. Prior to the hearing, the parties filed memoranda on the legal issues and

1 status reports. The petitioning intervenors also filed legal memoranda. I heard argument from
2 the parties and the petitioning intervenors.

3 Premera objects to paragraph 1 of the Case Management Order, in which I declare that
4 Premera's Application (also referred to as a "Form A" or the "Statement") to convert to a
5 for-profit entity will not be considered by me to be complete until after the adjudicative
6 hearing has concluded and the administrative record is closed. Premera asserts that the CMO
7 is contrary to the governing statutes, RCW 48.31B.015(4)(b) and 48.31C.030(4). Premera
8 argues that the statutory language compels the following conclusions: (1) the Statement must
9 be declared complete prior to the hearing; (2) a hearing must be held and a decision rendered
10 by me within 60 days after the Statement is complete; and (3) the Statement is complete when
11 Premera has filed those documents that it asserts satisfy the requirements of
12 RCW 41.31B.015(2) and 41.31C.030(2). Based on this interpretation of the statutory
13 language, Premera contends that the Statement was complete on October 25, 2002; therefore,
14 a hearing and a final administrative decision must be rendered within 60 days of that date.¹
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16 OIC Staff takes the position that the Application must be approved or disapproved
17 within 60 days after both the Commissioner declares the Statement to be complete and a
18 public hearing is held. In other words, both events must occur before the 60-day period in
19 which to render a decision begins to run. Moreover, the OIC Staff asserts that when the
20 Statement is declared to be complete is within my discretion and is not determined by Premera
21 or the OIC Staff.
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26 ¹ Despite its legal position, Premera has offered to extend the date for me to make a decision
until March 1, 2003. As discussed more fully herein, I will not, nor do I find it necessary, to
commit to rendering a decision by that particular date.

1 I believe the OIC Staff's position on when the 60-day period begins to run more
2 closely reflects legislative intent, particularly when one looks at the statutory language in
3 context. However, even if the statute compels the hearing and the decision to occur within
4 60 days after only the Statement is declared complete, it is clear that I make the decision on
5 completeness. As will be discussed more fully below, Premera's Application is not complete;
6 therefore, under no circumstances has the 60-day decision period begun to run.
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8 FINDINGS OF FACT²

- 9 1. On September 17, 2002, Premera made the initial filing of a Form A Statement
10 with the OIC seeking the approval of the Insurance Commissioner to
11 reorganize. The proposed reorganization would permit Premera and its
12 nonprofit affiliates to convert to for-profit entities. Control of Premera,
13 including affiliates, would be transferred to a for-profit holding company. As
14 part of the conversion, a Foundation Shareholder would be created that would
15 own 100 percent of the capital stock of the newly formed for-profit holding
16 company. The proceeds of the sale of the stock are intended to be used, as
17 allowed by law, for healthcare related purposes.
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- 19 2. On September 27, 2002, Premera filed a supplement to its Statement.
- 20 3. On October 7, 2002, OIC Staff issued a deficiency letter identifying materials
21 that had been omitted from the Form A.
- 22 4. On October 22, 2002, the OIC Staff, through one of its consultants, issued a
23 document and information request to Premera. The request was divided into
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26 ² The Findings of Fact are based on the parties' representations in their status reports and during oral argument. The timing of the events described herein were undisputed.

1 “Initial Questions,” “List of Documents Requested,” and “Meetings to be
2 Scheduled with Premera Management and Employees.”³

3 5. On October 25, 2002, Premera filed a supplement to its Form A Statement.

4 6. On November 1, 2002, the OIC Staff, through one of its experts, submitted to
5 Premera a supplemental data request.

6 7. On November 7, 2002, certain of Premera senior management were made
7 available for a group interview by OIC Staff consultants for approximately
8 4 hours.

9 8. On November 11, 2002, Premera gave a partial response to request for
10 documents.

11 9. In mid-November, Premera informed the OIC Staff that additional requested
12 documents would be made available for inspection in a “data room.” Premera
13 initially prohibited the consultants from copying any document that Premera
14 deemed confidential. OIC Staff asserted that this prohibition would impede the
15 consultants’ review. After acceptable confidentiality agreements were reached
16 between Premera and the consultants, this prohibition was lifted.

17 10. At the time of the hearing, Premera had produced approximately 16,000 pages
18 of material for inspection.

19 11. On November 19, 2002, the OIC Staff issued a second deficiency letter to
20 Premera identifying additional materials that Premera had not submitted in its
21 filing.

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26 ³ The requests for information and documents submitted to Premera from the OIC staff and its
consultants are attached to Premera’s status report, dated November 22, 2002, and filed herein.

1 12. Interviews of Premera senior management by the consultants were scheduled
2 for November 26 and 27, 2002.

3 13. The OIC Staff anticipates that additional interviews and data and document
4 requests may be necessary before the consultants have all of the material they
5 need to review the proposed transaction.
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7 14. The consultants will produce reports of their findings, which will be given to
8 Premera.

9 15. Premera intends to file responsive reports of its consultants.

10 **CONCLUSIONS OF LAW**

11 The general requirements for the contents of a Form A Statement are set forth in
12 RCW48.31B.015(2) and 48.31C.030(2) and WAC 284-18-910. Without listing all its
13 components, in essence the Form A Statement must describe the transaction, the parties
14 involved, the nature and amount of the consideration, the financial condition of the acquiring
15 party, and the future business plans of the acquiring party. However, the scope of information
16 and the level of detail necessary to a Form A are logically dictated by the standards under
17 which the Commissioner must decide to approve or disapprove the transaction. In deciding
18 whether Premera Blue Cross and its affiliates may be acquired by a newly formed for-profit
19 holding company, I will have to consider the following factors, among possibly others:
20 (1) will the effect of the transaction substantially lessen competition or tend to create a
21 monopoly; (2) are there public benefits in economies of scale or availability of insurance that
22 outweigh any reduction in competition resulting from the transaction; (3) will the financial
23 condition of the acquiring party jeopardize the stability of the company or prejudice the
24 interests of subscribers; (4) are the future plans of the acquiring party unfair or unreasonable
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1 to subscribers and not in the public interest; (5) does the post-transaction management have
2 the requisite competence, integrity, and experience; and (6) is the acquisition likely to be
3 hazardous to the insurance-buying public. *See* RCW 48.31B.015(4)(a) and 48.31C.030(5).

4 Considering the breadth of the issues I am statutorily required to consider and the
5 complexity of the transaction proposed by Premera, it is no surprise that the information
6 initially supplied by Premera in its Form A filing has been since that time and may again have
7 to be supplemented substantially through requests for additional information by the OIC.
8 Indeed the Holding Company Act expressly contemplates that the Commissioner, or as in this
9 case the OIC Staff, may ask for additional information to complete the Statement.
10 RCW 48.31B.015(4)(a)(1)(ii)(A) and 48.31C.030(4). Furthermore, it is only when I am
11 satisfied that Premera has supplied all the information needed to address the statutory
12 considerations that the Statement may be considered complete. RCW 48.31B.015(4)(b) and
13 48.31C.030(4). Premera has taken the position that the Form A is comprised of only what it
14 has voluntarily filed, and that the information that is being solicited by the OIC Staff from
15 Premera is not part of the Statement. Relying on this strained distinction, Premera makes the
16 argument that its initial Form A filing, as supplemented by it on September 27, 2002, and
17 October 25, 2002, is the complete Form A. However, Premera's interpretation of the law
18 nullifies the purpose of giving the Commissioner the power to request additional information
19 and the authority to declare when the Statement is complete. Furthermore, it does not make
20 sense to so limit what constitutes the Form A Statement in light of the broad statutory criteria
21 for approval or disapproval of the transaction.

22 Based upon the facts presented in the parties' status reports, as found above, and the
23 relevant statutory language, I conclude that Premera's Form A Statement is not complete.
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1 The information that the OIC Staff is soliciting is relevant to the statutory criteria I must
2 consider. The OIC Staff and its consultants have been specific in their requests, and thus far
3 they have been diligent in their pursuit of information. It has been barely a month since the
4 OIC Staff consultants were given free access to the documents requested and had the
5 opportunity to conduct interviews of key people in Premera's management. Moreover,
6 Premera has expressly stated that it intends to file reports of its consultants that will be
7 responsive to whatever issues or concerns the OIC Staff consultants raise in their reports. I
8 think it is appropriate that Premera be given that opportunity. Indeed, I specifically want
9 Premera to further explain the nature and effects of its proposed transaction in light of any
10 questions or problems raised by the OIC Staff and its experts. I will consider such responsive
11 reports as further supplementing Premera's Statement.
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14 My ruling on the completeness of the Statement is not dependent on adopting either
15 Premera or the OIC Staff's interpretation of whether the 60-day window to render a decision
16 necessarily begins after the hearing or at some point before the hearing. However, I believe
17 that it is appropriate, as the OIC Staff suggests, to examine the timeframe for making a
18 decision in context of the competing interests that the legislature apparently considered when
19 adopting ch. 48.31.B and 48.31C RCW. A business transaction, such as an acquisition of
20 control of an insurer, can be time-sensitive due to financial and market concerns. Therefore,
21 some protections are given to acquiring companies against inaction by the regulator.
22 See RCW 48.31B.015(b) and 48.31C.030(4). However, the business of insurance is one
23 affected by the public interest. RCW 48.01.030. The legislature recognized this by
24 establishing fairly broad criteria for the Commissioner to consider in deciding to approve or
25 disapprove a proposed acquisition. In addition, persons whose significant interests are
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1 affected by the transaction are given the ability to participate in the hearing process with the
2 same rights as a party to conduct discovery, examine witnesses, offer evidence, and make
3 argument. RCW 48.31B.015(4)(b) and 48.31C.030(4). Finally, the hearing itself is a
4 contested case proceeding under the Administrative Procedure Act (“APA”),
5 RCW 48.31B.070 and 48.31C.140, with all of the protections afforded participants in such a
6 proceeding, ch. 34.05 RCW.
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8 The interpretation of the law offered by the Staff is a reasonable one. For support, one
9 only has to look at the provisions of RCW 48.31C.030(4) and (5). The statute permits the
10 Commissioner to *approve* an acquisition of a domestic health care service contractor or health
11 maintenance organization without ever holding a hearing; although, at their option, the
12 Commissioner or a party to the transaction may request a hearing. However, the
13 Commissioner may *disapprove* an acquisition only after a hearing. There is no deadline for
14 requesting a discretionary hearing under RCW 48.31C.030(4) or determining that a mandatory
15 hearing under RCW 48.31C.030(5) is necessary. The request for a discretionary hearing or
16 the need for a mandatory hearing could occur on the third day or the fifty-third day after the
17 filing of a “complete” Form A. If the latter scenario were to occur, an APA hearing with
18 possible intervening participants, could not be accomplished by the sixtieth day, or at least
19 could not be accomplished without severely prejudicing the rights of the parties, the rights of
20 potential intervenors, and the public interest.
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23 In addition, the timeframes set forth in the Holding Company Act for deciding on the
24 completeness of a Statement and whether to approve or disapprove a transaction are directory.
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1 While the time period discussed in *Erection Co. v. Labor & Industries*, 121 Wn.2d 513,
2 852 P.2d 288 (1993) was jurisdictional and, therefore, mandatory, the word “shall” in
3 RCW 48.31B.015 and 48.31C.030 regarding the 60-day decision period should be construed
4 as directory and permissive. The plain language of the statutes does not create a jurisdictional
5 requirement. Moreover, where important public rights and interests are involved, such as in
6 this case, courts will not construe a statutory timeframe as a mandatory requirement.
7 *See, e.g., Brock v. CY*, 476 U.S. 253 (1986); *Niichel v. Lancaster*, 97 Wn.2d 620, 647 P.2d
8 1021 (1982); *State v. Bryan*, 93 Wn.2d 177, 606 P.2d 1228 (1980); *State v. Miller*, 32 Wn.2d
9 149, 201 P.2d 136 (1948).

11 The proceedings in this matter are being conducted in full compliance with the law.
12 Premera’s objections to the Case management Order have been noted but are rejected. There
13 is no need to amend the Case Management Order. I appreciate that Premera does not want
14 this process to continue indefinitely, as I do not. On the other hand, I must ensure that all of
15 the interests recognized by the legislature in the Holding Company Act are taken into account.
16 The briefing by the parties and the potential intervenors regarding who may participate in this
17 case has just been completed. A decision on intervention status will be issued as soon as
18 reasonably possible. Schedules for potential discovery, pre-filed testimony, and hearing dates
19 can be set once the identities of the participants in the proceeding are established by me. In
20 the meantime, the OIC Staff and Premera should continue to work diligently in identifying
21 and gathering all of the information needed in the Form A Statement in order to review the
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1 transaction in light of the statutory criteria. **The OIC Staff and Premera should each file**
2 **written status reports with me on January 14, 2003, regarding their progress.**

3 **IT IS SO ORDERED**, this 23rd day of December, 2002.
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MIKE KREIDLER
7 Insurance Commissioner
for the State of Washington
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PROOF OF SERVICE

I certify that I served a copy of this document on all parties or their counsel of record on the date below as follows:

X US Mail Postage Prepaid via Consolidated Mail Service

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I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this _____ day of December, 2002, at Olympia, WA.

James Odiorne
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